NO. 84-1819

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In the Supreme Court of the United States

OCTOBER TERM 1984

JOE ROSETTI

Petitioner

VERSUS

AVONDALE SHIPYARDS, INC.

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the reliance by the United States Court Of Appeals for the Fifth Circuit upon *Lundy v. Litton Systems, Inc.*, 624 F2d. 590 (5th Cir. 1980) was erroneous and whether the Court's ignoring the controlling precedent of *Hollister v. Luke Construction Co.*, 517 F2d. 920 (5th Cir. 1975), *Walter v. Marine Office of America*, 537 F2d.89 (5th Cir. 1976) and *Alfred v. M/V MARGARET LYKES* 398 F2d. 648 (5th Cir. 1968), constitutes an irreconcilable conflict within the United States Court Of Appeals for the Fifth Circuit itself, as well as various other Circuits within the United States.

2. Whether the failure of the United States Court Of Appeals for the Fifth Circuit to consider the undisputed fact that no crew was aboard the vessel involved constitutes error.

3. Whether the effect of the holding of the United States Court of Appeals for the Fifth Circuit that a hull constitutes a vessel altered, disregarded or changed long standing pre-existing law that shipbuilding does not bear significant relationship to maritime activity.

4. Whether the United States Court Of Appeals for the Fifth Circuit recognized that its decision created a conflict within its own Circuit with cases such as *Lowe v. Ingalls Shipbuilding, A Division of Litton*, 723 F2d. 1173 (5th Cir. 1984) and *Hollister v. Luke Construction Co.*, 517 F2d. 920 (5th Cir. 1975).

5. Whether the decision by the United States Court Of Appeals for the Fifth Circuit has disregarded the test laid down by this Court in *Executive Jet Aviation, Inc. v. City Of Cleveland, Ohio*, 409 US 249, 93 S. Ct. 493, 34 L. Ed. 2d

454 (1972) and *Foremost Insurance Co. v. Richardson*, 457 US 668, 102 S. Ct. 2654, 73 L. Ed. 2d 300 (1982) and has simply determined that maritime situs, disregarding the requirement of a nexus to traditional maritime activity.

6. Whether the decision of the United States Court Of Appeals for the Fifth Circuit tacitly rules that the Longshoremen's and Harbor Workers' Compensation Act, 33 USC 901 et seq., specifically 905(b). creates a cause of action in favor of the injured worker contrary to *Russell v. Atlantic & Gulf Stevedores*, 625 F2d. 71 (5th Cir. 1980) and other cases holding differently.

7. Whether the reliance by the United States Court Of Appeals for the Fifth Circuit upon *Director, Office Of Workers' Compensation Programs v. Perini North River Associates*, 459 US 297, 103 S. Ct. 634, 74 L. Ed. 2d 465 (1983) is misguided and misplaced.

8. Whether a person engaged in shipbuilding services on an incomplete vessel lacking most of its navigational equipment, with no operational crew, and which had never undergone dock or sea trials, who was injured while tripping over a welding line is capable of presenting a claim under the Federal Admiralty Jurisdiction.

9. Whether an alleged tort arising out of an accident involving a shipbuilding employee on an incomplete vessel within the shipyard itself bear any significant relationship to traditional maritime activity sufficient to confer Federal Admiralty Jurisdiction.

LIST OF PARTIES

1. Joe Rosetti, plaintiff/appellant-respondent
2. Paul S. Minor, Counsel for plaintiff/appellant
3. Judy M. Guice, Counsel for plaintiff/appellant
4. Paul T. Benton, Counsel for plaintiff/appellant
5. David T. Cobb, Counsel for plaintiff/appellant
6. Avondale Shipyards, Inc., defendant/appellee-petitioner
7. Nelson W. Wagar, III, Counsel for defendant/appellee-petitioner

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IN THE
SUPREME COURT OF THE UNITED STATES
JOE ROSETTI

Plaintiff,

versus

AVONDALE SHIPYARDS, INC.

Defendant/Appellee-Petitioner

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REFERENCES TO OFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The judgement of the United States Court of Appeals for the Fifth Circuit is made a part of this Writ Application and is contained in the Appendix herein. Likewise, the original decision and writted reasons of the District Court for judgement in petitioner's favor, dismissing the respondent's cause of action is reproduced *verbatim* in the Appendix.

STATEMENT OR GROUNDS UPON WHICH JURISDICTION OF THE UNITED STATES SUPREME COURT IS BEING INVOKED

The decree sought to be reviewed is the judgement of the United States Court of Appeals for the Fifth Circuit dated November 15, 1984 and contained in that certain opinion styled "*Hall v. Hvide Hull No. 3*" bearing numbers 83-3471, 83-3580 and 83-3607. The instant case was consolidated with the foregoing opinion for the purpose of the Appeal to the Fifth Circuit.

The petitioner filed a Petition For Rehearing and Suggestion For Rehearing En Banc which was denied by the Court on January 29, 1985. A Motion for a Stay of Mandate Pending Application for Writ of Certiorari to this Court was also filed by petitioner and denied by the Court

on February 20, 1985.

It is submitted that this case is within the discretionary jurisdiction of the Court pursuant to 28 U.S.C. 1254.

STATUTES INVOLVED IN THIS CASE

The Longshoremen's And Harbor Worker's Compensation Act, 33 U.S.C. 901, et seq., 905(b) provides:

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitiled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or in directly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

STATEMENT OF THE CASE

The exact date of the alleged accident is not known, involving respondent herein, for reasons which are now unimportant, but it is believed to have occurred between February 28th and March 2, 1981.

It is an undisputed fact that the OGDEN I was a

new vessel under construction by Avondale Shipyards, Inc. According to the deposition testimony of Avondale's employee, Mighnon Tourne', and the progress report for the vessel on the dates in question, the vessel was approximately 83.36% complete. (depo. of Mighnon Tourne', 30-8, and "Progress report" attached thereto as depo. exhibit #3). Mr. Rosetti himself admitted that OGDEN I was not finished at the time of his injury (depo. of plaintiff, 96-2), and no sea trials had been performed (96-7), and that dock trials had not been undertaken (depo. of plaintiff, 96-22). The Affidavit of Mr. Richard M. Adler, project manager, Avondale Shipyards, Inc., stated that on the relevant dates, the OGDEN I was under construction and was approximately 80% to 85% complete, the vessel was not navigable, the majority of the navigation equipment was not installed aboard the OGDEN I, dock trials and sea trials had not taken place, and sea trials did not take place until August 1, 1981.

The jurisdiction of the District Court was alleged to arise under the General Maritime Law.

ARGUMENT

The reason why writs should be granted by the Supreme Court in this case is because the decision by one panel of the U. S. Court of Appeals for the Fifth Circuit has radically altered long standing precedent concerning the limits of federal admiralty jurisdiction with respect to persons covered by the Longshoremen And Harbor Workers' Compensation Act; in this case, a shipyard worker. The Court of Appeals' decision conflicts with precedent in its own Circuit, and with prior decision in other Circuits as well. The decision creates maritime jurisdiction where none has existed before and opens wide a whole industry to tort actions by its own employees who already have a remedy

in compensation from the same employers and insurers. In short, the consequences of the Court of Appeals' holding will be dramatic and far reaching, and the holding itself is clearly wrong.

The problem which had plagued this case from the time summary judgement was contemplated by the District Court is the failure to clearly and concisely state what is really at issue in the *Rosetti* case, and the other cases with which it was consolidated for appeal. The District Judge granted summary judgement in favor of the defendent, Avondale Shipyards, Inc., in each case, because he felt that the hull on which the accidents occurred did not constitute a "vessel". The opinion of the Court of Appeals begins by stating in the first paragraph that "the central issue in these three Appeals is whether a hull, floating on navigable waters during shipbuilding construction is a vessel for purposes of a tort action authorized by ... 33 USC §905(b)".

In its Memorandum In Support of its Motion For Summary Judgement and in its Brief to the Court of Appeals, the defendant in *Rosetti* has vainly sought to set forth the real issue in question. The real issue is whether the tort in these three cases bears a significant relationship to traditional maritime activity as required by *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio,* 409 US 249 93 St. C. 493 34 L. Ed. 2d 454 (1972); *Foremost Insurance Co. v. Richardson,* 457 US 668 102 S. Ct. 2654 73 L. Ed. 2d 300 (1982). The defendant/appellee-petitioner have consistently maintained that the torts in these cases do not bear any significant relationship to traditional maritime activity. They rely on several decisions which have expressly held that a tort arising out of work on a launched but incomplete ship lacks maritime flavor and is not within the admiralty

jurisdiction of this Court. *Hollister v. Luke Construction Co.*, 517 F2d. 920 (5th Cir. 1975); *Alfred v. M/V MARGARET LYKES*, 398 F2d. 684 (5th Cir. 1968); *Garcia v. American Marine Corp.*, 432 F2d. 6 (5th Cir. 1970); *Frankel v. Bethlehem Fairfield Shipyards, Inc.*, 132 F2d. 634 (4th Cir. 1942), cert. den. 319 US 746 63 S. Ct. 1030 (1943); *Walter v. Marine Office Of America*, 537 F2d. 89 (5th Cir. 1976).

The plaintiffs/appellants/respondents, and the Court of Appeals do not directly dispute these cases, but hold that the Supreme Court's mandate in *Executive Jet* and *Foremost* somehow do not apply to workers covered by the LHWCA. This position is based upon the Supreme Court's decision in *Director, Office Of Workers' Compensation Programs v. Perini North River Associates*, 459 US 297 103 S. Ct. 634 (1984).

At this point, the respondent would concede that the OGDEN I, the vessel involved in the *Rosetti* case, constitutes a "vessel" for the purpose of the LHWCA. Thus, no argument is asserted that the accident involved in this case did not occur at a maritime situs. The only dispute before this Court at this time is whether the *Executive Jet* and *Foremost* decisions are to be applied in actions brought under 33 USC 905(b) actions, and, if so, whether the torts in these cases bear a significant relationship to traditional maritime activity.

It is suggested here that the Court of Appeals' reliance on the *Perini* decision to support its holding that *Executive Jet* and *Foremost* do not apply to actions brought under 33 USC 905(b) is grossly misplaced. In the first place, in the Supreme Court's opinion, Justice O'Connor, makes no statement, such as the one made by the

Court of Appeals, that "the remedies of employees who are covered by the Longshoremen's Act and who are injured on navigable waters are not affected by *Executive Jet.*" In footnote 29 of the *Perini* opinion, the Court addresses the argument made by the defendant that coverage for *compensation benefits* under the LHWCA is premised upon admiralty jurisdiction which requires a connection between an employee and traditional maritime activity. In rejecting the (respondent's) contention, this Court stated only that the Court's discussion in *Executive Jet* "was occasioned by 'the problems inherent in applying a locality - alone test of admiralty tort jurisdiction to crashes of aircraft ...' in a situation where 'the fact that an aircraft happens to fall in navigable waters, rather than on land, is wholly fortuitous.' "

Secondly, the Court of Appeals' opinion makes much of the fact that "under the Supreme Court's decisions in *Perini,* supra and *Scindia Steam & Navigation Co., Ltd. v. SeLos Santos,* 451 US 156, 101 S. Ct. 1615, 68 L. Ed. 2d 1 (1981) ... the congressional intent of the 1972 Amendments to the Longshoremen's Act, including that provided by §905(b), was to preserve within tort remedy of an Act-covered employee for injuries caused by the negligence of a vessel, broadly defined, while on the navigable waters. It is to be noted that in the *Perini* opinion itself, the discussion in the opinion about these Amendments all concern the 1972 Amendments as they applied to *compensation benefits.* Specifically it was noted in the opinion that:

> "The Director and Churchill claimed that when Congress added the status requirement in §3(a), providing that a covered employee must be 'engaged in maritime employment,' it intended to restrict or define the scope of the increased coverage provided by the expanded situs provision in §3(a), but that Congress had

> no intention to exclude from coverage workers, like Churchill, who were injured upon actual navigable waters, ie, navigable waters as previously defined, in the course of their employment upon these waters."

The fact that Congress did not intend to withdraw *compensation coverage* to those workers who had already been covered by the Act prior to 1972, but rather, on the contrary, intended to *expand* coverage to *additional* workers is not disputed here. What is disputed is whether Congress *created* a maritime cause of action under §905(b) to persons who otherwise would not have a cause of action.

The respondent would respectfully point out that while Congress *expanded* coverage of the Act in 1972 for compensation benefits, the congressional intent with respect to §905(b) was to restrict the cause of action preserved to maritime workers under the Act. For example, it is well settled that prior to 1972, maritime workers could assert an action based upon the warranty of seaworthiness. This action was abrogated by Congress in 1972, so that such workers can only assert a cause of action for vessel negligence. The Court of Appeals confused the congressional intent with respect to these different sections of the Act and compounded their error by assuming that the Supreme Court in *Perini,* which also was a *compensation* case, was also expanding the rights afforded to maritime workers to assert a *tort* action against their employers. This is, in essence, the error of the Court of Appeals which should be addressed by this Court.

It should be noted that the Court of Appeals does not dispute the fact that §905(b) of the LHWCA did not create a new cause of action, but merely preserved an injured worker's right to recover damages from third parties in accordance with non-statutory negligence principals. *Russell v. Atlantic & Gulf Stevedores,* 625 F2d. 71 (5th Cir. 1980); *William P. Brooks Construction Co., Inc. v. Guthrie,* 614

F2d. 509 (5th Cir. 1980); *Gay v. Ocean Transport & Trading, Ltd., 546 F2d. 1233 (5th Cir. 1977); Parker v. Southern Louisiana Contractors, Inc.*, 537 F2d. 1113 (5th Cir. 1976). Nevertheless, despite this agreement, the Court of Appeals' holding effectively creates a cause of action under the general maritime law which did not exist prior to 1972. Since the Supreme Court denied writs in *Frankel v. Bethlehem Fairfield Shipyard, Inc.*, supra, as long ago as 1943 the Courts of Appeals have consistently held that shipyard workers engaged in construction of a launched but incomplete vessel were not actions which fell within a Federal Court's admirality jurisdiction. See also *Hollister v. Luke Construction Co.*, supra; *Garcia v. American Marine Corp.*, supra; *Alfred v. M/V Margaret Lykes*, supra, and *Walter v. Marine Office of America*, supra, *Lowe v. Ingalls Shipbuilding, A Division of Litton*, 723 F2d. 1173 (5th Cir. 1984).

The Court of Appeals clings to *Lundy v. Litton Systems, Inc.*, 624 F2d. 590 (5th Cir. 1980) which stands alone, together with the instant cases, in holding that Federal Admiralty Jurisdiction exists under these circumstances. The panel which decided these cases "agrees that we are bound by *Lundy* and that, under the law of the Circuit, it must be followed in the absence of an en banc overruling." It is difficult to understand how the panel overlooks the numerous other cases which would also presumably bind the Court on the issue of whether construction activity on a launched incomplete vessel bears sufficient relationship to traditional maritime activity to confer maritime jurisdiction. Much discussion in the Court of Appeals' opinion revolves around the issue of whether the hulls in these cases are vessels or not. Although the respondent would certainly assert that it would be better if incomplete hulls were not considered to be vessels, since this would greatly simplify the question of admiralty

jurisdiction, it does not dispute this at this time. As the Court of Appeals points out in its opinion,since the case of *McCarthy v. The Bark Peking.* 716 F2d. 130 (2nd Cir. 1983), cert. den. _____ U. S. _____, 104 S. Ct. 1439, 79 L. Ed. 2d 210 (1984), if a museum piece which had not put to sea for over half a century is to be considered a vessel, certainly the OGDEN I would qualify under such a test. However, merely because the OGDEN I must be considered as a maritime situs does not mean that all activities aboard it must be considered "maritime" in nature. To do so would completely ignore and nullify the Supreme Court's holdings in *Executive Jet* and *Foremost.*

Finally, the Court of Appeals asserts that such cases as *Williams v. Avondale Shipyards, Inc.,* 452 F2d. 955 (5th Cir. 1971) and *Rogers v. M/V RALPH BOLLINGER,* 279 F. Supp. 92 (ED LA. 1968) stand for the proposition that in cases such as the ones at bar, Federal Admiralty Jurisdiction must exist since those cases involved shipyard workers injured on incomplete vessels in navigable waters were entitled to assert these actions under the general maritime law. It should be noted that both these cases occurred before the 1972 Amendments, and it is questionable whether such actions would have been viable after 1972 when the Supreme Court eliminated the warranty of seaworthiness as a remedy available to such workers. The holding in both cases has a beguiling appeal as a basis for the Court of Appeals' holding in these cases, but such reliance is again misplaced. In the *Rogers v. M/V RALPH BOLLINGER* case, the Court stated:

> "A ship under construction, launched and laying in navigable waters, but not yet completed, is not a vessel in navigation. Hence a shipyard worker injured aboard it is not entitled to a warranty of seaworthiness. But it is afloat, and accidents happening on it

> occur on navigable waters. Therefore, the admiralty jurisdiction of this Court extends to tort claims arising from such accidents. Thus, insofar as the shipyard worker in this case is concerned, this Court has jurisdiction in admiralty of his claim that the owner of the vessel and the owner's officers were negligent ...".

Similarly, in the *Williams* case, the Court held that a cutter on the water under final sea trial was not a vessel in navigation for purposes of Jones Act coverage, but nevertheless a maritime tort action might be available to a person injured on it.

Of cardinal importance is the fact that neither *Executive Jet* nor *Foremost* had been decided by the Supreme Court when the two opinions in *Williams* and *Rogers* were rendered. It is open to question whether the torts in these cases would have survived the *Executive Jet* analysis, but they were not required to do so at that time. Therefore, neither *Rogers* or *Williams* should stand as reliable precedent that the torts involved in the cases at bar bear a significant relationship to maritime activity and provide a basis for admiralty jurisdiction.

Secondly, even if the *Williams* and *Rogers* cases are accepted as providing that the possibility of admiralty jurisdiction over torts occurring on incomplete vessels exists, they do not support the proposition that every tort which could conceivably occur on such vessels would confer admiralty jurisdiction. It should be noted in the *Rogers* decision that the Court stated that it had jurisdiction in admiralty "of his claim that the owner of the vessel and the owner's officers were negligent ...". The holding was not a blanket pronouncement that any occurrence aboard such a vessel would give that Court jurisdiction. The limited jurisdictional holdings in *Williams* and *Rogers* may well be confined to their facts. In any case, the activity involved in

the cases at bar have already been determined not to be sufficiently related to traditional maritime activities on many occasions by both the Fifth and Fourth Circuit Courts Of Appeal. Thus even if the holdings in *Rogers* and *Williams* were correct as applied to the specific facts of each case, they do not stand for sweeping proposition asserted by the Court of Appeals in these cases that maritime jurisdiction exists.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Petition For Writ Of Certiorari has been mailed to Paul S. Minor, Esq., Post Office Drawer 1388, Biloxi, Mississippi, 39533, by depositing it in the United States Mail, postpage prepaid and properly addressed.

Metairie, Louisiana, this 29th day of April, 1985.

NELSON W. WAGAR, III

APPENDIX "A"

Mrs. Amy Hall, Widow of Jose R. Duncan, Individually and as Natural Tutrix of the Minors, Alan Renaldo Duncan and Cindy Winkleth Duncan,

Plaintiff-Appellant

v.

HVIDE HULL NO. 3 and AVONDALE Shipyards, Inc.,

Defendants-Appellees.

Thanh H. DANG,

Plaintiff-Appellant,

Fidelity & Casualty Co.,

Intervenor-Appellant

v.

AVONDALE SHIPYARDS, INC., et al.,

Defendants-Appellees.

Joe ROSETTI,

Plaintiff-Appellant,

v.

AVONDALE SHIPYARDS, INC.,

Defendant-Appellee.

Nos. 83-3471, 83-3580 and 83-3607.

United States Court of Appeals,
Fifth Circuit.

November 15, 1984.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before RUBIN, REAVLEY, and TATE, Circuit Judges.

TATE, Circuit Judge:

The central issue in these three appeals[1] is whether a hull, floating on navigable waters during shipbuilding construction, is a vessel for purposes of a tort action authorized by section 5(b), 33 U.S.C. § 905(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.§§ 901 et seq. (hereinafter, "Longshoremen's Act"). The district court said "no". We reverse, on the basis of our decision in *Lundy v. Litton Systems, Inc.* 624 F.2d 590 (5th Cir. 1980), *reh. denied*, 629 F.2d 1349, *cert. denied*, 450 U.S. 913, 101 S.Ct. 1353, 67 L.Ed.2d 337 (1981). The panel agrees that we are bound by *Lundy* and that, under the law of the circuit, it must be followed in the absence of en banc overruling. However, the panel also notes that an issue of bancworthy dimension may be presented by the conflict between *Lundy's* rationale and some expressions in our more recent jurisprudence that an injury to ship construction workers on board a vessel under construction, although on navigable waters, is not a maritime business. *See, e.g., Lowe v. Ingalls Shipbuilding, A Division of Litton*, 723 F2d 1173, 1185, 1187 (5th Cir.1984.[2]

The issues will be discussed as follows:
I. The *Lundy* holding and its rationale; II.

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[1] All three of these cases were dismissed by the same district court after a hearing on a motion for summary judgement. All three were then consolidated on appeal.

[2] Thus, the defendants in two of the three cases, (*see* note 12 *infra;* diversity jurisdiction is present in the third appeal) urge that, even if we find the present floating hulls to be vessels for purposes of §905(b), federal admiralty jurisdiction, the sole jurisdictional basis relied upon, is absent. If applied as controlling to the present facts, the *Lowe* principle would not only be in conflict with *Lundy* but also, arguably, with the rationale of other decisions of this and another circuit (to be cited in the text *infra*, accompanying notes 8-10).

Federal admiralty jurisdiction of a § 905(b) action for injuries upon a hull that is under construction and floating in navigable waters; and III. Facts and issues peculiar to each of the three appeals.

1. *The Lundy holding and its rationale.*

In each of the present three suits, an employee admittedly within the coverage of the Longshoremen's Act was injured or killed at work on a floating hull from, variously, 70-90% completed. In each suit, the employee or his survivors brought suit against the vessel or its owner to recover damage that allegedly resulted from the defendant's negligence.

The Longshoremen's Act, as amended in 1972, permits a person covered by the Act to recover tort damages for injuries resulting from the negligence of a vessel. 33 U.S.C. §905(b).[3]

[3] Section 905(b) reads in its entirety:

In the event of injury to a *person covered under this chapter caused by the negligence of a vessel*, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action *against such vessel* as a third party in accordence with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons *engaged* in providing stevedoring services to the vessel. *If such person was* employed by the vessel to provide *shipbuilding* or repair *services*, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing shipbuilding or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other

All parties concede that the employees in question were covered by the Act at the time of their injury or death.[4] The defendants dispute, however, that a "vessel"[5] was involved in the respective work accidents.

In *Lundy v. Litton Systems, Inc.* 624 F2d. 590 (5th Cir. 1980), *reh. denied*, 450 U.S. 913, 101 S.Ct. 1353, 67 L.Ed.2d 337 (1981), the plaintiff, Lundy, a person covered by the Longshoremen's Act, fell through an escape hatch while working aboard the USS Hewitt. When the accident occurred, the USS Hewitt was 97% complete, was being prepared for sea trials, and had an assigned crew. Lundy sued his employer, as owner of the ship, for damages resulting from negligent injury under, inter alia, § 905(b). The district court dismissed Lundy's claim, holding that an incomplete ship is not a vessel for purposes of § 905(b). We reversed, holding

(Footnote 3 Continued)
remedies against the vessel except remedies available under this chapter.
(Emphasis added.)

[4] Coverage applies to "any engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or a member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." 33 U.S.C. § 902(3).

[5] The term "Vessel is defined by the Act as "any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner pro hac vice, agent, operator, charter or bareboat charterer, master, officer, or crew member." 33 U.S.C. § 902(21). *See also*, however, 1 U.S.C. § 3 (defining "vessel") and discussion in text *infra* slip op. at 799, at ____F2d.____*et seq.*

> The definitional section of the LHWCA provides that "[t]he term 'vessel' means any vessel upon which or in connection with which a person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment ..." 33 U.S.C.A. § 902(21) (West 1978). Persons entitled to benefits under the LHWCA are "employees." See id § 903(a). "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker ...." Id. § 902(3). We have previously held that "[s]hipbuilders who do the incidential work to construct a vessel for launching are just as engaged in shipbuilding as those who are completing the task after something is finished which can be called a ship." Ingalls Shipbuilding Corp., Division of *Litton Systems, Inc. v. Morgan*, 551 F.2d 61 (5th Cir. 1977). Thus, incomplete ships upon which 33 U.S.C. § 902(3) employees are working at a site which [is within] the coverage of the Act, 33 U.S.C. § 903, are vessels within the meaning of 33 U.S.C. § 902(21). The USS Hewitt was thus moored to the statute.
>
> 624 F.2d at 592.

In the panel's view, the rationale and holding in *Lundy* represent controlling precedent in this circuit and require reversal of the summary judgements granted in the three appeals before us, insofar as they are based upon the district court's appreciation that the floating hulls in the three present cases could not be vessels because uncompleted. *Lundy's* characterization of the hull in that case as a vessel for § 905(b) purposes rested directly upon its holding that the incomplete ship afloat was a "vessel"

within the statutory meaning of the Longshoremen's Act.

[1] The application of *Lundy* to the present facts, thus, cannot be respectably distinguished, as argued, simply because the present floating hulls were only, respectively, 75-90%, 70%, and 80-85% complete, instead of, as in Lundy, 97% complete. The floating hulls in the present cases, equally to that in *Lundy*, were "capable of being wsed as a means of transportation on water", 1 U.S.C. § 3, and were thus likewise "vessels" for the purposes of the Longshoremen's Act. *Burks v. American River Transportation Company*, 679 F.2d 69, 75 (5th Cir. 1982).

Furthermore, to anticipate II *infra*, in *Lundy* the sole basis of federal jurisdiction asserted for this § 905(b) action was the admiralty jurisdiction[6]. The *Lundy* panel rejected (although without express comment) contentions of the defendant therein, similar to those that are presently advanced, that an action for negligent injury to a shipbuilding employee could not be brought in federal court against the uncompleted vessel within the ambit of § 905(b) because the injury did not arise from a maritime tort.[7]

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[6] The court's opinion does not explicitly mention the basis for jurisdiction. However, we have reviewed the briefs filed on appeal in *Lundy*, and they indicate no other basis for jurisdiction.

[7] In *Lundy*, we thus rejected the following argument made by the vessel owner in its appellate brief at pp. 12-13:

> In *Walter v. Marine Office of America*, [537 F.2d 89 (5th Cir. 1976)], this Court said:
>
> "... Traditionally contracts for the construction of a ship are not ordinarily within the Article III maritime and admiralty jurisdiction."
>
> [537 F.2d 94].

Indeed, the *Lundy* defendant relied in part upon *Hollister v. Luke Construction Company,* 517 F.2d 920 (5th Cir.1975), the same decision relied on heavily by the present defendants, *see* II *infra. Lundy's* application to the present facts, thus, cnnot be distinguished on a jurisdictional basis either.

Lundy's definition of a floating hull as a vessel for purposes of § 905(b) is consistent with our decision in *Burks v. American River Transportation Company,* 679 F.2d 69 (5th Cir.1982) and with the definition of vesselin Title 1 (General Provisions), Chapter 1 (Rules of Construction), of the United States Code:

(Footnote 7 continued)

> In *Hollister v. Luke Construction Co.,* [(517 F.2d 920 (5th Cir.1975)], this Court said: "...The fact that the barge here was only partially completed at the time of plaintiff's injury is thus dispositive of his claim based on Luke's alleged maritime negligence. *See Garcia v. American Marine Corp., supra,* 432 F.2d [6] at 7 [(5th Cir.1970)]; *Alfred v. M/V MARGARET LYKES, supra,* 398 F.2d [684] at 685, [(5th Cir.1984)]. The district court correctly granted summary judgment on that claim as well as on the others."

[517 F.2d 921, 922]

> Appellant suggests in his brief that this Court should extend the doctrine of *Smith v. M/S The Captain Fred, supra,* to allow a third-party action to be brought by the appellant against his employer and a co-employee on the theory that the incompleted ship was a vessel under the doctrine of *Reed v. The Yaka,* 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448 (1963). *Smith v. M/S The Captain Fred, supra,* dealt with injuries suffered by a repair-man onboard the vessel. In this case [*Lundy*] there was no completed vessel, and the appellant's injury was not sustained aboard a completed vessel, nor resulted from the negligence of a completed vessel.

The word "vessel"includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

1 U.S.C. § 3.

In *Burks, supra,* 679 F.2d at 75, we held that this code definition provides the meaning of vessel "as that term is used in the LHWCA [Longshoremen's and Harborworkers' Act]." That a waterborne structure is *capable* of being used for transportation on water"(emphasis the court's) is, thus, the test. *Id.* In *Burks,* the court further indicated that a harbor worker on a vessel so defined would have a § 905(b) negligence action for injury thereupon, 679 F.2d at 76[8].

The Second Circuit, by a similar rationale, likewise recognized the principle that, for purposes of the Longshoremen's Act, a hull is a vessel if, even though notself-powered, it is capable of being towed on the water. In *McCarthy v. The Bark Peking,* 716 F.2d 130, 133-34 (2nd Cir.1983), *cert. denied sub. nom. South Street Seaport Museum v. McCarthy* ,___U.S.___, 104 S.Ct. 1439, 79 L.Ed.2d 760 (1984), the issue was whether an employee covered by the Longshoremen's Act was injured as the result " 'of the negligence of a *vessel*' within the meaning of § 905(b)", 716 F.2d at 133 (emphasis added), and thus entitled to bring an action against the vessel under

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[8] However, the *Burks* claimant had lost his negligence action in the trial court, and did not urge that point on appeal. 679 F.2d at 76.

The court had previously noted that the claimant therin was not a member of the crew (*see* note 10 *infra*) of the watercraft on which injured and that, by reason of the 1972 amendments, he had no unseaworthiness cause of action. *Id.*

§ 905(b)", 716 F.2d at 133 (emphasis added), and thus entitled to bring an action against the vessel under § 905(b) for its negligent injury to the plaintiff employee. The ship on which the employee was injured was a floating museum vessel, which, rudderwelded, had not put to sea under its own power for half a century, and which was not susceptible to use as a self-navigating craft (although capable of being towed). The vessel defendants contended that the plaintiff employee could not avail himself of a § 905(b) remedy because this ship allegedly could not be considered a vessel within the meaning of the Longshoremen's Act.

The Second Circuit rejected the defendant's contention. Relying on our decisions in *Burk* and *Lundy*, cited above, the Second Circuit held that the ship in questsion met the test of being a vessel, since it was "*capable of being used as a means of transportation on water*" within the statutory definition provided by 1 U.S.C. § 3.*Id.*, 716 F.2d at 134.[9] The court, additionally, pointed out uniform jurisprudence by which, under this test, a waterborne structure *capable* of being used for watertransportation, even if only while towed, could be considered a vessel.

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[9] Referring to a relevant rule of stationory construction, the Second Circuit stated:

> Since Congress, in its use of the term 'vessel' in 902(21) and 905(b), did not provide a definition different from the generally acknowledged one found in section 3, we may presume, as other courts have, that it intended to adopt this commonly-used term. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947, 952-53 (7th Cir. 1979), *aff'd* 446 U.S. 359, 100 S.Ct. 1723, 64 L.Ed.2d 354 (1980).
> (footnote omitted).

McCarthy, supra, 716 F.2d at 134.

Id, 716 F.2d at 134-35.[10] The court also noted that the 1972 amendments to the Longshoremen's Act had been held "to be broadly inclusive." *Id,* 716 F.2d at 133.

By this test, all three hulls in the present cases were vessels ofr purposes of a § 905(b) action. They had been launched and were afloat in navigable waters, although moored to the shore.

By its terms, § 905(b), enacted by the 1972 revision of the Act, recognizes that an Act-covered employee injured while working on an uncompleted vessel is entitled to assert a negligence action against it or its owner. The statutory section also recognizes that a "person employed by the vessel to provide shipbuilding ... services" may bring a negligence action against the vessel (except where the injury results from the negligence of persons engaged in providing shipbuilding or repair services. *See* note 2 *supra* (quoting § 905(b) in full)). Prior to the 1972 amendments of the Act, "[a] shipbuilder's worker ... assisting in the building and ultimate commissioning of a launched but uncompleted vessel floating or maneuvering in navigable waters" had been held to be entitled under general maritime negligence principles to sue the vessel or its owner for injuries sustained while on the incompleted vessel in navigable waters. *Williams v. Avondale*

[10] Whether the "vessel" was also "in navigation", so as to present a Jones Act situs (or so as to constitute a waterfront employee "a master or member or a crew of any vessel", 33 U.S.C. § 902(3), who could thus be excluded from coverage by the Longshoremen's Act), presents a different issue, one that is not involved in the present actions. *See, e.g., Williams v. Avondale Shipyards, Inc.* 452 F.2d 955 (5th Cir. 1971)(a cutter on the water under final sea trial was not a vessel in navigation for purposes of Jones Act coverage, but nevertheless a maritime tort action might be available to a person injured on it).

Shipyards, Inc. 452 F.2d 955, 958-59 (5th Cir. 1971).[11] For reasons to be set forth more fully in part II *infra*, the statutory language of § 905(b) in this regard was intended, in our opinion, to preserve maritime jurisdiction over the shipbuilder's cause of action against a floating vessel unde construction that had been previously recognized by decisions such as *Williams*.

Thus, *Lundy's* rationale and holding— controlling as to the three cases now before us—is consistant both with principles expressed by relevant jurisprudence of this court and with the statutory intent of § 905(b).

II. *Federal admiralty jurisdiction of a § 905(b) action for injuries upon a hull under construction, which is floating in navigable waters*

For reasons to be stated more fully, we also find that *Lundy's* holding is consistent with prior jurisprudential holdings and the Congressional intent, in its implicit findings that there is federal admiralty jurisdiction over § 905(b) actions brought by shipbuilders injured aboard partially constructed vessels floating on navigable waters. We are further of the opinion that the language of § 905(b) was

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[11] *See*, to similar effect, *Rogers v. M/V Ralph Bollinger*, 279 F.Supp. 92, 93 (E.D.La. 1968):

> A ship under construction, launched and lying in navigable waters, but not yet completed, is not a vessel in navigation. Hence a shipyard worker injured aboard it is not entitled to a warranty of seaworthiness. But it is afloat, and accidents happening on it occur on navigable waters. Therefore, the admiralty jurisdiction of this Court extends to tort claims arising from such accidents. Thus, insofar as the shipyard worker in this case is concerned, this Court has jurisdiction in admiralty of his claim that the owner of the vessel and the owner's officers were negligent....

intended to preserve maritime jurisdiction over such claims, which under pre-1972 judicial interpretations were concidered to be maritime actions. We are thus unable to accede to the argument of the defendents that, even through their hull might under the statutory intent *of § 905(b)* be considered a "vessel" against which a negligence action is recognized by § 905(b), nevertheless, federal admiralty *jurisdiction* would not exceed to a § 905(b) action against such a vessel because a hull under shipbuilding construction bears no significant relationship to traditional maritime activity. We find no such distinction between a § 905(b) cause of action and admiralty jurisdiction to have been Congressionally intended by the enactment of § 905(b).

However, we recognize that this holding is in conflict with expressions in at least two decisions of this circuit, which (although concerning distinguishable issues) indicated that federal admiralty jurisdiction did not extend to injuries on uncompleted vessels. Relying on these decisions, the defendants in two of the cases before us [12] argue that federal jurisdiction is lacking, on the principle we stated in *Lowe v. Ingals Shipbuilding, A Division of Litton*, 723 F.2d 1173 (5th Cir. 1984), that "an injury to a ship construction worker onboard a ship under constructio and lying in navigable waters is not a maritime tort". *Id.* at 1187).

Lowe did not cite *Lundy, but in support of this principle relied upon the holding to this effect in Hollister v. Luke Construction Co., 517 F.2d 920 (5th Cir. 1975), which*

[12] *Hall v. Hvide Hull No. 3*, No. 83-3471: *Dang v. Avondale Shipyards*, No. 83-3580. In the third appeal before us, *Rosetti v. Avondale Shipyards, Inc.*, N0. 83-3607, there was federal diversity jurisdiction.

had been cited to the *Lundy* panel but ignored by it as non-controlling. *See* text at notes 6 and 7 *supra*. *Holister* had conceded the principle expressed in *Williams v. Avondale Shipyards, Inc., supra*, 452 F.2d at 959—that an injury on a vessel (Broadly defined as in 1 U.S.C. § 3) on navigable waters may give rise to a maritime negligence action—but distinguished it as inapplicable because 'a tort arising out of work on a launched but inconplete vessel ... lacks maritime flavor." *Hollister, supra*, 517 F.2d at 921.

Withour reference to the construction of the Longshoremen's Act by *Lundy*, the *Lowe* panel construed the Supreme Court's holding in *Executive Jet Aviation Inc. v. City of CLeveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), reaffirmed in *Foremost Insurance Company v. Richardson*, 457U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982), as providing that "Where [under previous decisional law] the tort was previously maritime only because of situs, the activity being nonmaritime, *Executive Jet* now requires that the tort be considered non-maritime." *Lowe* indicated that, therefore, *Executive Jet* had overruled prior decisional law that had recognized as a maritime tort the negligence of an incompleted vessel, if afloat on navigable waters, that injured a construction worker aboard. 723 F.2d at 1185-1187.[13]

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[13] The actual merit-issue in *Lowe* was whether a shipyard employer, covered by the Longshoremen's Act, had an independant cause of action against an abestos manufacturer for the excess of compensation benefits (due under the Act to its asbestos-disabled employ*ees*) paid by the employ*er* over the amounts received by the employ*ees* in settlement of their tort claims against the manufacturer. However, without reaching the merits of the claim, *Lowe* held that federal subject matter was not established, after rejecting several other federal-jurisdiction grounds advanced. In substance, *Lowe* stated that federal

The decision in *Lundy*, which the panel finds to be directly applicable to and controllling of the present facts, is essentially inconsistent with the rationale of *Lowe* and *Hollister*, although constistent with our decision in *Burks v. American River Transportation Company* (1982), cited in part I *supra*. En banc resolution of the conflicting rationales may thus be necessary.

We should perhaps note, however, that *Lowe* and *Hollister* arose in a context distinguishable from the pres ent. *Lowe* did not concern a § 905(b) action; rather, it was a declaratory judgment action to determine the indemnity rights of a shipyard employer against an asbestos manufacturer, with regard to the manufacturer's liability to the employer for longshoremen's compensation benefits which the shipyard employer had paid its employees contracting asbestosis during their employment. *See* note 13 *supra*. Similarily, *Hollister* can arguably be distinguished as not pertaining to a § 905(b) action, because there the injured employee himself denied Longshoremen's Act coverage and sought recovery only under the Jones Act and the general maritime law (i.e., not as an employee covered by the Act asserting a maritime negligence claim preserved for him by § 905(b) of the 1972 amendments to the Act).[14]

(Footnote 13 Continued)
maritime law, upon which federal jurisdiction might be based, did not govern the right of the shipyard employer to recover against the manufacturer, since any injury caused by the *manufacturer* to the construction employees aboard the floating hulls would not under *Executive Jet* be a maritime tort.

[14] In fairness, we should note that *Hollister* relied upon two decisions of this circuit in which the panels *did* decide that issue. These decisions held that admiralty jurisdiction was absent for a tort arising out of work on a launched but incompleted vessel; *Garcia v. American Marine Transportation*, 432 F.2d 6

More importantly, however, the central retionale of *Lowe* is not applicable to the Congressionally contemplated §905(b) action by a shipbuilder injured on an uncompleted vessel afloat on navigable waters, which was considered at the time of enactment of § 905(b) in 1972 as a maritime action since arising on a navigible situs. *Lowe's* central rationale was that shipbuilding was a non-maritime activity, so that therefore an injury sustained in such activity did not meet the test announced in *Executive Jet Aviation v. City of Cleveland,* 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), that even though an injury to an employeee occurs over navigable waters, it is "also" necessary "that the wrong bear a significant relationship to traditional maritime activity." *Id.,* 409 U.S. at 268, 93

(Footnote 14 Continued)
(5th Cir. 1970) and *Alfred v. M/V Margaret Lykes,* 398 F.2d 684 (5th Cir. 1968. Garcia relied solely upon *Alfred,* and *Alfred relied primarily upon Frankel v. Bethlehem-Fairfield Shipyard, Inc.,* 132 F.2d 634 (4th Cir.1942), *cert. denied,* 319 U.S. 746, 63 S.Ct. 1030, 87 L.Ed. 1702 (1943), overlooking that, despite broad language, the issue actually decided in *Frankel* was whether a construction worker on such an incompleted vessel was a *seaman,* so as to have a Jones Act remedy. So far as we can ascertain, the jurisdictional holdings in *Alfred* and *Garcia* have not been cited or followed by any decision other than *Hollister.*

Indeed, their jurisdictional holdings are contrary to the controlling decisions of the Supreme Court and of this circuit. As *Lowe* itself states with regard to pre-1972 decisional law, although a ship construction worker was held to be engaged in a non-maritime activity, nevertheless, "even if the injured party was not engaged in maritime acrivity, the tort was maritime if it took effect on navigable waters. *Grant Smith-Porter Ship Co. v. Rohde,* 257 U.S. 469, 42 S.Ct. 157, 66 L.Ed. 321 (1922)." *Lowe v. Ingalls Shipbuilding,* 723 F.2d 1173, 1186 (5th Cir.1984). *See also Burks v. American River Transportation Company,* 679 F.2d 69, 75-76 (5th Cir.1982); *Rogers v. M/V Bollinger,* 279 F.Supp. 92, 96 (E.D.La.1968) (Rubin, J.).

S.Ct. at 504. *Lowe's* rationale is of doubtful relevance to the present issues, because of its differences with the present cases in cause of action [15] and in the legal values of federalism there (not here) at issue.[16]

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[15] The actual holding of *Lowe* was only that no maritime tort upon which federal admiralty jurisdiction could be founded was presented by the suit to determine a shipbuilding employer's claim of tortious liability to it of an asbestos manufacturer. Independent of any cause of action conferred by the Longshoremen's Act itself, the employer sought recognition of its right to require indemnification from the asbestos manufacturer for excess compensation payments made by the employer to its employees covered by the Act for asbestos-caused disability. *See* note 13. The concerns as to whether this cause of action represented a maritime tort are quite distinct, in our opinion, from the issue as to whether there is a federal jurisdiction to entertain the suit of a shipbuilding worker negligently injured on navigible waters, traditionally viewed as a maritime tort.

[16] In discussing the jurisdiction issue, the defendants here rely on a number of cases in addition to *Lowe*. *See Owens-Illinois v. United States District Court*, 698 F.2d 967 (9th Cir.1983); *Keene Corp. v. United States*, 700 F.2d 836 (2d Cir.), *cert denied*, ____U.S.____, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983); *Austin v. Unarco Industries, Inc.*, 705 F.2d 1 (1st Cir.), *cert dismissed*, ____ U.S.____, 104 S.Ct. 34, 77 L.Ed.2d 1454 (1983). *See also Harville v. Johns-Mansville Products Corp.*, 731 F.2d 775 (11th Cir.1984). Each of these cases, however, can be distinguished on the same grounds that *Lowe* may be distinguished: none involves either a § 905(b) claim against a vessel or its owner, or a question about the scope of the federal courts' admiralty jurisdiction under the Longshoremen's Act. All are based on the alleged liability of a manufacturer for injuries sustained in connection with the manufacturer's asbestos products. Even more important, perhaps, all involve the delicate question whether the federal interest in an amphibious worker's personal injury claims is sufficiently strong to justify federal courts supplanting state law with the federal common law of admiralty. *See Harville, supra*, 731 F.2d at 786. This question is not relevant to the present facts. *See* text. As the Supreme Court noted in *Scindia Steam &*

Of more central importance to rejecting the application of the *Lowe* rationale to the federal-jurisdiction issue now before us, however, is that the Supreme Court itself has held that the remedies of employees who are injured on navigable waters are not affedted by *Executive Jet. Director, Office of Workers' Compensation Programs v. Perini North River Associates*, 459 U.S. 297, 320 n. 29, 103 S.Ct. 634, 649 n. 29 (1984). Thus, in effect, if injury to an Act-covered employee was considered to constitute a maritime tort prior to the 1972 amendments, then, "the wrong [to him] bear[s] a significant relationship to traditional maritime activity," *Executive Jet, supra*, 409 U.S. at 268, 93 S.Ct. at 504, so as to meet this quoted "nexus" prong of the *Executive Jet* test for maritime-tort federal admiralty jurisdiction. (The present injury having occurred on the navigable waters, the "situs" test of *Executive Jet* is also here satisfied).

In *Perini, supra*, the Court specificlly rejected the contention that *Executive Jet* (characterized as applicable to a "'wholly fortuitous'" maritime situs) required limitation of a remedy to amphibious workers injured on navigable waters—a remedy that was Congressionally contemplated by the 1972 amendments to the Longshoremen's Act, in view of the absence of shown legislative intent to change prior jurisprudential interpretations so providing.

(Footnote 16 Continued)
Navigation Co., Ltd. v. De Los Santos, 451 U.S. 156, 165 n.13, 101 S.Ct. 1614, 1621 n. 13, 68 L.Ed.2d 1 (1981), "[i]t was anticipated ... that questions arising in § 905(b) cases 'shall be determined as a matter of federal law.'" (quoting S.Rep. No. 92-1125, p. 12 (1972). We know that "[o]ur regard for our federal system requires that we scrupulously confine federal admiralty jurisdiction to the precise limits defined by Congress." *Holland v. Sea-Land Service, Inc.*, 655 F.2d 556, 559 (4th Cir.1981). These sensitive values are not at issue in the present cases.

459 U.S. at 320 n. 29, 103 S.Ct. at 649 n. 29. In holding that the marine construction worker there involved, who was injured on actual navigable waters, was entitled to the Congressionally contemplated compensation remedy, the Court noted that he "was by no means 'fortuitously' on the water when he was injured", and also referred to the Act's legislative history and "jurisprudential interpretations over the course of decades" as affording a consideration by which *Executive Jet* did not apply so as to limit the remedy of an employee covered by the Act. *Id.*

Earlier, in describing the effect of the 1972 amendments to the Act, the Supreme Court in 1981 ahd noted that, while an Act-covered employee's right to recover for the ship's unseaworthiness was thereby abolished, nevertheless the COngressional intent was that "his right to recover from the shipowner for negligence was *preserved* in § 905(b), which provided a statutory negligence action against the ship." *Scandia Steam & Navigation Co., Ltd. v. De Los Santos,* 451 U.S. 156, 165, 101 S.Ct. 1615, 1621, 68 L.Ed.2d. 1 (1981) (emphasis added). Prior to the 1972 amendments to the Longshoremen's Act, an employee covered by the Act clearly had a maritime tort remedy against the vessel or its owner, when negligently injured bya vessel (broadly defined) that was afloat on navigable waters. *Lowe v. Ingalls Shipbuilding, supra,* 723 F.2d at 1185-86; *Burks v. American River Transportation Company,* 679 F.2d 69, 75-76 (5th Cir. 1982); *Rogers v. M/V Gollinger,* 279 F.Supp. 92, 96 (E.D.La. 1968) (Rubin, J.). *See also Grant Smith-Porter Ship Co. Rohde,* 257 U.S. 469, 477-78, 42 S.Ct. 157, 159, 66 L.Ed.2d 321 (1922).

[2,3] Under the Supreme Court's decisions in *Perini* and *Scindia, supra,* therefore, the Congressional intent of the 1972 amendments to the Longshoremen's Act,

including that provided by § 905(b), was to preserve within the federal admiralty jurisdiction the traditional maritime tort remedy of an Act-covered employee for injuries caused by the negligence of a vessel, broadly defined, while on the navigable waters.[17] For purposes of federal admiralty jurisdiction, maritime connexity (*Executive Jet's* requirement that the injury be in a "traditional maritime activity") was, in effect, Congressionally so determined through Congressional acceptance, in the 1972 revision of the Longshoremen's Act, of pre-1972 traditional judicial determinations of the maritime character of the activity involved in injuries to these amphibious workers. Thus, shipbuilding employees injured in constructing a vessel on navigable waters are regarded by § 905(b) as no less injured in a maritime employment than they were, before the enactment of § 905(b) in 1972, by the pre-1972 jurisprudence.

We therefore reject the defendants' contention that the present claims were not within the federal admirality jurisdiction and should, therefore, be dismissed. Consequently, the showing made in each of the cases does not permit summary judgment excluding maritime tort recovery and federal admiralty jurisdiction as to their claims of negligent injury by a vessel under construction

[17] Indeed, we ourselves reached this general conclusion in *Parker v. Southern Louisiana Contractors, Inc.*, 537 F.2d 113 (5th Cir. 1976). Althrough we rejected the contention that § 905(b) created a new and independant federal tort remedy for an Act-covered employee who was injured on land, we there concluded, as to the Congressional intent of § 905(b), that "[w]ith respect to third party actions for negligence, the reasonable inference [to be drawn from the legislative history] is that *the bounderies of maritime jurisdiction as defined under prior law ... were neither expanded nor constricted by passage of the 1972 Amendments, but simply retained.*" *Id.*, 537 F.2d at 117 (emphasis added.).

and upon navigable waters.

III. *Facts and isssues peculiar to each of the three appeals.*

We now set forth briefly the facts of each of the three appeals, construed as required most favorably to the opponents of the summary judgments granted, and dispose of any issues peculiar to that appeal.

A.

Hall v. HVIDE HULL NO.3—No. 83-3471

Jose R. Duncan died from exposure to argon gas on April 29, 1981. At that time, Duncan was employed by Avondale Shipyards, Inc. ("Avondale") and was working aboard the Hvide Hull No. 3, an Avondlae hull floating in a wet-dock at the Avondale Shipyards on the Mississippi. Duncan's widow and two minor children sue both the Hvide Hull No. 3 and Avondale in its capacity as owner of the hull.

In deciding the defendant's motion for summary judgment, the district court found that, at the time of Duncan's death, the Hvide Hull No. 3 was only 75-90% complete, had no assigned crew, and had never undergone sea trials. With these findings in mind, the district court ruled that, when Duncan died, the Hvide Hull No. 3 was not a vessel within the terms of section 905(b) of the Longshoremen's Act and that no basis for jurisdiction existed under the general maritime law.

[4] As previously noted, *Lundy* requires reversal.[18]

B.

Dang v. Avondale Shipyards, Inc.—83—3580

On or about July 12, 1978, Thanh H. Dang sustained injuries while working aboard the M/V El Paso Columbia, a tanker being constructed by Avondale pursuant to a contract with El Paso Columbia Tanker Company ("El Paso"). At the time of Dang's accident, the M/V El Paso Columbia was floating in the Mississippi River and was held in place by a number of mooring lines. Following the accident, Dang filed two timely negligence actions against Avondale and El Paso.

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[18] The district court also found that Duncan's death, it it resulted from negligence at all, resulted from Avondale's negligence as shipbuilder, not as shipowner. The applicable language in section 905(b) provides that an action for "negligence of a vessel" cannot be brought "if the injury was caused by the negligence of persons engaged in providing shipbuilding or ship services to the vessel." 33 U.S.C. § 905(b). According to the district court, this language provides an additional basis for dismissing the plaintiffs' suit. Dismissal on this ground upon the factual showings made at summary judgement stage was not warranted. Under § 905(b) a vessel owner also furnishing services to its vessel through Longshoremen's-Act-covered employees "is liable only for negligence in its 'owner' capacity." *Jones & Laughlin Steel Corporation v. Pfeiffer*, 462 U.S. 523, — n. 6, 103 S.Ct. 2541, 2547 n. 6 (1983). The facts in the case now before us were not sufficiently developed below for the district court to conclude by summary judgment that Avondale's negligence resulted from its activities as shipbuilder instead of as vessel owner. In short, the district court's conclusion regarding this issue was premature.

[5] An isssue as to whether Avondale was an owner of the vessel stems from a provision in the defendant's construction contract:

> Title to the Vessel [The M/V EL PASO COLUMBIA], *to the extent completed,* and title to all work and material performed upon or installed in the Vessel shall vest in the Purchaser [El Paso]....The Contractor [Avondale] shall have an equity in such material and completed contract work in the Contractor's Shipyard and elsewhere to the extent that it has not been paid for by the Purchaser and to the extent that it is not incorporated in or installed on a *delivered* Vessel. (emphasis added).

The district court dismissed the two defendants for different reasons. It dismissed Avondale on the grounds that, according to the construction contract, Avondale was not a vessel and so could not be held liable for vessel-owner negligence in a tort action authorized by section 905(b). It dismissed El Paso on the grounds that, at the time of Dang's accident, the M/V El Paso Columbia was not a vesssel within the terms of section 905(b), since at that time the tanker was only 70% complete, had no assigned crew, and had never had any sea trials.

Reversal of El Paso's dismissal is required by *Lundy, see* I above. Turning then to the dismisssal of Avondale, we find that the district court erred in concluding that no material facts are in dispute regarding Avondale's alleged ownership interest in the M/V El Paso Columbia. In our view, the revelant provision in the contract is ambiguous and is subject to factual parol evidence as to its intended meaning with regard to ownership of the vessel. A potential meaning susceptive of parol explanation is that, in fact, El Paso had only a security interest in the vessel and that

its paper evidence to title was merely a disguised security interest to be held until the "completed contract work" was "delivered", not until such time would title be vested in El Paso. Another potential meaning of the contract is that the two parties were co-owners.

Therefore, on the face of the summary judgment showing, we are unable to conclude on the naked basis of the contract provision that no material issue of fact as to ownership is disputed, so as to permit summary judgment.

For the purpose of this appeal, then, under the showing made in support of the motion for summary judgment, both Avondale and El Paso may be either an owner or a co-owner of the M/V El Paso Columbia, a vessel on navigable waters within the meaning of *Lundy*, and thus subject to 905(b) liability. *See* I. *supra*. We reverse the summary judgments in favor of these two defendants.[19] This does not preclude a contrary finding on the merits, or on later motion for summary judgement if the facts we have assumed are shown to be incorrect.

C.

Rosetti v. Avondale Shipyards, Inc.—83—3607

On or about March 2, 1981, Joe Rosetti, an employee of Universal Systems, Inc., sustained injuries while working aboard the Ogden 1, a hull floating in the Mississippi River and owned by Avondale. Following his accident,

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[19] The district court also found that, if Dang was injured by Avondale's negligence, he was injured by Avondale's negligence as shipbuilder, not as shipowner. On the basis of the facts herein thus far shown, summary judgement on this ground was not warranted. *See* note 18 *supra*.

Rosetti filed this suit against Avondale as owner of the hull. Shortly threrafter, the defendant filed a motion for summary judgment.

In deciding the defendant's motion, the district court found that, at the time of Rosetti's accident, the Ogden 1 was still under construction: it was only 80-85% complete, was lacking most of its navigational equipment, had no operations crew, and had never undergone dock or sea trials. In light of these findings, the district court ruled that, at the relevant time, the Ogden 1 was not a vessel within the terms of section 905(b) of the Longshoremen's Act. Under *Lundy*, the district court erred.

Since the parties are diverse, federal jurisdiction has never been disputed. We therefore reverse.

IV.

In light of the foregoing, we VACATE the district court's dismissals by summary judgement in all three consolidated cases, and we REMAND for further proceedings consistant with the views expressed herein.

VACATED AND REMANDED.

APPENDIX "B"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOE ROSETTI
VS.
AVONDALE
CIVIL ACTION NUMBER 82-747
SECTION. "H"

REASONS FOR JUDGEMENT

Plaintiff, Joe Rosetti, was injured while working as a pipe fitter in the construction of a vessel, the OGDEN I, at defendant's shipyard. Plaintiff, an employee of Universal Systems, Inc., was injured when he tripped over a welding line while traversing a deck on the ship on which he was working. Defendant Avondale owned and controlled the OGDEN I at the time of plaintiff's accident. Plaintiff seeks damages from Avondale under a theory of maritime negligence statutorily preserved by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §905(b). Based upon diversity jurisdiction, plaintiff sets forth a state law negligence claim as well.

Defendant Avondale has filed a motion for summary judgement. For the reasons discussed below, the motion is granted.

MARITIME TORT

At the time of the accident, the OGDEN I was not a "vessel" for the purpose of a §905(b) negligence action. The defendant has shown, by deposition of its insurance manager and affidavit of its project manager, that the ship was only 80-85% complete at the time of the accident, the "majority" of the navigation equipment had not been

installed, and neither dock trials nor sea trials had taken place. In addition, no vessel operations crew had been assigned. All personal aboard at the time of the accident were involved in the construction of the OGDEN I. The first sea trials took place five months after the plaintiff's injury.

The project manager's affidavit is uncontradicted. The plaintiff has submitted three affidavits that he contends pose a genuine issue of material fact as to the stage of completeness of the vessel. The three affidavits are executed by the plaintiff and two of his fellow workmen, also Universal employees. These affidavits fail to meet the requirements that they "be made on personal knowledge" and "show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e). Unlike the affidavit submitted by defendant, there is no affirmative indication that any of these affidavits is competent to testify as to the stage of completeness of a vessel under construction. The affidavits therefore are not adequate to raise genuine issues of material fact.

It is well established that §905(b) does not create a new cause of action for negligence. *Russell v. Atlantic & Gulf Stevedores,* 625 F2d. 71 (5th Cir. 1980). Because §905(b) merely preserves an injured worker's right to recover damages from third parties in accordance with traditional nonstatutory negligence principles, it can not serve as a separate basis for jurisdiction. Since the ship under construction was not a "vessel," maritime jurisdiction does not exist.

STATE LAW TORT

It is clear that the compensation scheme of the Longshoremen's and Harbor Workers' Compensation Act

applies in this case. When an employee begins work for an employer under the coverage of the LHWCA, he consents to the Act's tradeoff of certain and absolute benefits in lieu of less certain benefits obtainable in tort actions. *Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977). The Act makes compensation the exclusive remedy of the injured employee against his employer. 33 U.S.C. §§904(a), 905(a), 933(i). Although plaintiff was the nominal employee of Universal, defendant contents that it also enjoys immunity from tort by virtue of the "borrowed servant" doctrine. If an employee is found to be a "borrowed servant," his exclusive remedy against the "borrowing employer" is compensation under the Act. *Gaudet, supra.*

The Fifth Circuit has recently observed that the "central question" in determining "borrowed servant" status "is whether someone has the power to control and direct another person in the performance of his work." *Hebron v. Union Oil Co.*, 634 F2d. 245, 247 (5th Cir. 1981). The record strongly supports defendant's position as the "borrowing employer" of Rosetti. The plaintiff's own deposition indicates that Avondale exercised virtually complete control over Universal employees such as plaintiff. Avondale furnished all supervision; Universal merely supplied the manpower to work under Avondale's direction and control. Avondale could promote Universal employees to supervisory positions and could fire them for any reason. No material issues of fact remain with regard to issues determinative of borrowed employee status. Defendant's status as borrowing employer under LHWCA operates as a bar to plaintiff's state law negligence claim.

Because there are no genuine issues of material fact and defendant is entitled to judgement as a matter of law, Avondale's motion for summary judgement is granted.

August 18, 1983 /S/ A. Duplantier
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 83-3607

JOE ROSETTI,

Plaintiff-Appellant,

versus

AVONDALE SHIPYARDS, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

ORDER:

☑ The motion of appellee for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

☐ The motion of appellee for ☒ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to andincluding _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above

mentioned certificate shall be filed with the Clerk of this Court within that time.

☐ The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

☐ The motion of _____ for a further stay of the issuance of the mandate is DENIED.

/s/ ALBERT TATE, JR.

UNITED STATES CIRCUIT JUDGE

APPENDIX "D"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-3607

JOE ROSETTI

Plaintiff-Appellant,

versus

AVONDALE SHIPYARDS, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion November 15, 1984, 5 Cir., 198 ____, ____F2d____)
(January 29, 1985)

Before

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ TATE

UNITED STATES CIRCUIT JUDGE